PART 1

DOMESTIC BRIBES

The bribery of government officials in this country and abroad has long been condemned. Commercial bribery involving a foreign government official has been illegal under federal law since the Foreign Corrupt Practices Act (FCPA) was passed in 1977.

It is now generally accepted that the same policies apply to bribery of private individuals. As a result, commercial bribery—the corrupt dealing with agents or employees of prospective commercial partners to secure an advantage over business competitors—is now roundly condemned. In its most traditional form, commercial bribery involves paying a kickback to a purchasing agent in order to persuade that agent to buy the products of the bribe-payer rather than those of a competitor. This form of private commercial bribery is illegal in most states.

Interestingly, private commercial bribery is not explicitly prohibited by federal law. But the US Department of Justice (DOJ) uses state laws, in combination with wire-fraud statutes and the Travel Act, to prosecute domestic private commercial bribery. The Travel Act makes it a federal crime to “travel or use the mail or any facility of interstate commerce with the intent to promote, manage, establish, carry on, or facilitate the promotion, management, establishment or carrying on, of any unlawful activity.”

Most importantly, the Travel Act defines “unlawful activities” as including “bribery in violation of the laws of the State in which
committed or of the United States.” Thus, to prove a violation of the Travel Act, the government must establish that the defendant: (1) used a facility of interstate or foreign commerce; (2) with intent to commit any unlawful activity, and (3) thereafter performed an additional act to further the unlawful activity. In other words, the use of a facility of interstate commerce such as telephones, fax transmissions, wire transfers, or Internet communications to further a private bribe is a violation of the Travel Act.

To use the Travel Act to punish private commercial bribery, federal authorities must rely on state statutes, which outlaw private commercial bribery. Such statutes commonly provide that a person is guilty of bribing when he confers (or offers or agrees to confer) any benefit upon an employee or agent of the fiduciary without the consent of the latter’s employer or principal, with a intent to influence his conduct in relation to his employer’s or principal’s affairs.

The statutes that the federal authorities use to prosecute private commercial bribery commonly include the mail and wire-fraud statutes, racketeering charges, and section 2(c) of the Robinson–Patman Act, an antitrust law that has been held to encompass private commercial bribery.

The aggressive enforcement of such bribery prohibitions by the DOJ and US Securities and Exchange Commission (SEC) reveals that even the slightest jurisdictional nexus will be used. Thus, to the extent that private commercial bribery might involve even the most tangential use of the US mail system, telephone, or banking system, companies can assume that federal enforcement authorities will claim they have jurisdiction to investigate and prosecute.